Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

SHELLY L. MANN; ROBERT W. THORSON, individually and as representatives of the class, and BEVERLY KISH,

Petitioners,

-vs-

PATRICK J. CONLIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

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No. 93-1395

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHELLY L. MANN; ROBERT W. THORSON,
Plaintiffs-Appellants,

BEVERLY KISH,
Proposed Intervenor-Appellant,

v.

PATRICK J. CONLIN,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed April 15, 1994

Before: JONES, BOGGS, and DAUGHTREY, Circuit Judges.

BOGGS, Circuit Judge. The plaintiffs, Robert Thorson, Shelly Mann, and Beverly Kish, are litigants who have appeared before the defendant, Michigan Circuit Judge Conlin, in a variety of domestic relations cases. The

plaintiffs filed this 42 U.S.C. § 1983 action in federal district court, alleging that Judge Conlin's manner of conducting cases violates their due process and equal protection rights. The district court dismissed their complaint on the grounds that Judge Conlin was entitled to judicial immunity on the plaintiffs' claim for money damages and that the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971) required the federal court to abstain from granting equitable relief. Because we find that the district court's conclusions of law are correct, we affirm.

I

The gravamen of the plaintiffs' complaint is the manner in which Judge Conlin conducts divorce, custody, and support hearings in his courtroom. Each plaintiff has a long list of complaints about Judge Conlin's conduct in his or her case. While an exhaustive litany of the plaintiffs' individual complaints is not necessary, we include a brief description to indicate the flavor of this case.

Plaintiff Thorson

Robert Thorson alleges that Judge Conlin required Thorson to pay $500 to his wife's attorney before Thorson could get a hearing on whether or not a proposed judgment of divorce conformed to the record made at the hearing. Since Thorson did not have $500 in his pocket, Judge Conlin entered the original judgment over Thorson's objections. Thorson did not appeal this order.

Several months later, Thorson appeared before Judge Conlin in a dispute regarding visitation rights. Judge Conlin allegedly told Thorson that a hearing on this issue would be scheduled only if Thorson paid the retainer for his wife's attorney, paid her attorney's fees, and agreed to be bound by the referee's findings. Thorson did not appeal this order, either.

Thorson also alleges that at a later date he asked Judge Conlin to grant an adjournment because he was ill. Judge

Conlin allegedly made the grant of adjournment contingent on Thorson paying his ex-wife $135, the amount that she claimed she was losing in wages for the day. Because he did not have the $135, Thorson alleges he was forced to proceed while ill. Judge Conlin's order was later affirmed by the Michigan Court of Appeals.

Finally, Thorson alleges that Judge Conlin forced Thorson to pay $1,535 to his ex-wife's attorney before he would set a hearing date on Thorson's motion for change of custody. Judge Conlin also allegedly refused to set the hearing until Thorson's appeal on the custody issue was resolved.

Plaintiff Mann

Shelly Mann's complaint against Judge Conlin is the result of a custody battle. Judge Conlin originally awarded custody to Mann, but her ex-husband filed a motion to change the order. A referee held a hearing and recommended that Mann's ex-husband have custody. Mann objected and requested a *de novo* hearing on the issue, to which she was apparently entitled under Mich. Comp. Law § 552.507. Judge Conlin, however, gave custody to Mann's ex-husband without granting Mann a hearing. Mann appealed this ruling and refused to turn over her children to her ex-husband. She relented after she spent 10 days in jail. The Michigan Court of Appeals held that Judge Conlin acted correctly in jailing Mann for refusing to turn over her children.

Mann's *de novo* hearing was held six months after Mann requested it, even though a court rule required Judge Conlin to hold the hearing within 56 days. He awarded custody to Mann's ex-husband, ordered supervised visitation, and set child support payments. According to Mann's complaint, this order was overturned on appeal. On remand, Judge Conlin made other arrangements that Mann found unsatisfactory.

Finally, Mann's ex-husband requested permission to move out of state with their minor children. Judge Conlin

ordered a hearing to be held within one week. During this hearing, Mann objected on the grounds of jurisdiction, claiming that the pending appeal of the earlier custody decision divested the court of jurisdiction. Mann alleges that Judge Conlin stopped the hearing, telephoned the court of appeals, and then advised Mann's ex-husband to move for a remand. Mann's ex-husband followed the judge's advice and made a motion in the court of appeals for a remand, which was granted. After remand, Judge Conlin granted Mann's ex-husband permission to move out of state with the children.

Proposed-Intervenor Kish

Beverly Kish's story is similar to Mann's. Kish was a defendant in a divorce action in which Judge Conlin granted Kish's husband a divorce. She appealed the judgment. Kish alleges that Judge Conlin continued to enter orders in her case despite a lack of jurisdiction. Most notably, Judge Conlin suspended Kish's visitation rights until she underwent a psychological evaluation. Kish did not submit to an evaluation and she apparently still does not have visitation rights.

Kish also objects to Judge Conlin ordering her to pay the total cost of securing expert testimony about her children's mental well-being. Kish maintains that Judge Conlin had previously ordered Kish and her ex-husband to share the costs. Kish, however, did not appeal this ruling. Finally, Kish claims that he was openly biased against her and showed favoritism to her ex-husband. She alleges that even when Judge Conlin granted a *de novo* hearing on the issue of custody, he made it clear from the start that he would still grant custody of the children to her husband.

Proceedings

Thorson and Mann sued Judge Conlin under 42 U.S.C. § 1983, claiming that he was violating their constitutional rights; Kish moved to intervene in the suit. The plaintiffs requested various legal and equitable remedies, including injunctive and declaratory relief. The district court,

however, granted Judge Conlin's Rule 12(b)(6) motion. The district court concluded that the plaintiffs' claims for damages were barred by the doctrine of judicial immunity. The court also dismissed the plaintiffs' claims for injunctive and declaratory relief on the grounds that the *Younger* doctrine required the court to abstain from hearing the case.[1]

The plaintiffs then filed this timely appeal.

II

The plaintiffs first argue that district court used the wrong standard when it decided the Rule 12(b)(6) motion. This court reviews *de novo* a dismissal of a complaint pursuant to Rule 12(b)(6). *In re Delorean Motor Co.*, 991 F.2d 1236, 1239-40 (6th Cir. 1993). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

In this case, the district court cited *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976) for the proposition that, when considering a Rule 12(b)(6) motion, all allegations must be taken as true and viewed in the light most favorable to the plaintiff. The district court concluded that "[t]he actions in plaintiffs' complaint were all conducted within defendant's judicial capacity. These actions were also within the clear jurisdiction of defendant as a circuit court judge." Although the district court did not cite the *Conley* test, it is clear from the body of the opinion that the court found that there was no set of facts that would allow these plaintiffs to recover against Judge Conlin. Consequently, the district court did not err in this regard.

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[1]Kish's motion to intervene was denied as moot since her proposed complaint suffered from the same infirmities as Thorson's and Mann's complaint.

The plaintiffs also suggest that the district court abused its discretion in granting Judge Conlin's motion without first hearing oral argument. It is within the district court's discretion to expedite a case by ordering "the submission and determination of motions without oral argument . . . ." Fed. R. Civ. P. 78. The district court did not abuse its discretion in this respect, as will become clear in the discussion of the merits of the plaintiffs' case.

Finally, there is also a suggestion in the plaintiffs' brief that the district court should have allowed them to amend their complaint if the facts were insufficient to state a claim. The plaintiffs, however, never requested leave to amend their complaint and this argument is not properly before this court. *Pinney Dock & Transp. Co. v. Penn Centr. Corp.*, 838 F.2d 1445, 1461 (6th Cir.), *cert. denied*, 488 U.S. 880, 109 S. Ct. 196 (1988).

III

The plaintiffs contend that Judge Conlin is liable for money damages because he acted without jurisdiction, beyond his jurisdiction, in a non-judicial capacity, and in a legislative capacity. "[G]enerally, a judge is immune from a suit for money damages." *Mireles v. Waco*, 112 S. Ct. 286, 287 (1991) (per curiam). A judge is liable for money damages in only two circumstances: (1) where the judge acts in a non-judicial capacity; and (2) where the judge acts "in the complete absence of all jurisdiction." *Id.* at 288.

When a plaintiff alleges that a judge acted in a non-judicial capacity, this court relies "on a functional analysis to determine which acts are protected, meaning that one must determine whether the actions are truly judicial acts or 'acts that simply happen to have been done by judges.'" *Morrison v. Lipscomb*, 877 F.2d 463, 465 (6th Cir. 1989) (quoting *Forrester v. White*, 484 U.S. 219, 227, 108 S. Ct. 538, 544 (1988)). "Paradigmatic judicial acts" are those that involve resolution of disputes "between parties who have invoked the jurisdiction of a court . . . ." *Forrester*, 484 U.S. at 227, 108 S. Ct. at 544. "A judge will not be

deprived of immunity because the action he took was in error . . . ." *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S. Ct. 1099, 1105 (1978).

A

The United States Supreme Court has delineated types of acts by judges that are non-judicial and thus are not protected by the aegis of judicial immunity. For example, the Court has held that administrative decisions by judges are open to suit. *Forrester*, 484 U.S. at 228, 108 S. Ct. at 544. In *Forrester*, the issue was whether a state judge was immune from suit for allegedly demoting and then discharging an employee on account of her sex. The Court found that the judge's acts "may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative." *Forrester*, 484 U.S. at 229, 108 S. Ct. at 545. As we stated in *Morrison*, *supra*, the judge in *Forrester* was not entitled to judicial immunity because he was acting not as judge but "as an employer who is also a judge." *Morrison*, 877 F.2d at 465.

We applied the *Forrester* analysis in *Morrison* and held that a presiding judge was not immune from suit when he declared a moratorium on the issuance of writs of restitution by directing the clerk's office under his control not to issue any such writs regardless of other judges' orders. This moratorium prevented the plaintiff, Morrison, from retrieving some of his rental properties for over three weeks. *Morrison*, 877 F.2d at 464. We found that the judge's order was not a judicial act because it "did not alter the rights and liabilities of any parties but, rather, instructed court personnel on how to process the petitions made to the court." *Id.* at 466. We concluded that the moratorium differed from an adjudication because, in the latter case, the aggrieved party could, in most cases, appeal the court's decision, whereas an aggrieved party in the former case had no direct way to appeal an administrative order.

In this case, the plaintiffs have failed to allege any acts by Judge Conlin that fall within the definition of "administrative acts" as outlined above. The plaintiffs allege that Judge Conlin's acts of setting dates for hearings and of collecting attorney's fees that he had previously adjudged due were administrative rather than judicial acts. However, we find that while Judge Conlin's acts may have occasionally been in error or seemed unduly harsh, there is no escaping the conclusion that the offending acts are "judicial." In this case, Judge Conlin's orders affected the rights only of the individual plaintiffs in specific judicial proceedings; these acts are example of the "paradigmatic judicial acts" discussed in *Forrester* and *Morrison*. Thus, we hold that Judge Conlin was acting in his judicial capacity and is entitled to immunity for each of the allegedly "administrative" acts.

B

The plaintiffs also allege that Judge Conlin is liable for money damages because he lacked jurisdiction to enter certain orders in their cases. A judge will lose judicial immunity if he acts in the "clear absence of all jurisdiction." *Stump*, 435 U.S. at 357, 98 S. Ct. at 1105. There is a "clear absence of jurisdiction" when a court of limited jurisdiction attempts to adjudicate a case outside of its jurisdiction, such as when a probate court conducts a criminal trial. *Stump*, 435 U.S. at 357 n.7, 98 S. Ct. at 1105 n.7 (citing *Bradley v. Fisher*, 80 U.S. 335, 351-352 (13 Wall. 335) (1872)).

In their briefs and at oral argument, the plaintiffs argued that Judge Conlin acted in a legislative capacity by making rules for his courtroom. They cite *Supreme Court v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 100 S. Ct. 1967 (1980) and *Alia v. Michigan Supreme Court*, 906 F.2d 1100 (6th Cir. 1990) for the proposition that rule-making is a legislative, not a judicial, function. Since, the plaintiffs argue, the only court with jurisdiction to make court rules is the Michigan Supreme Court, Judge Conlin,

by making rules, was *a priori* acting outside of his jurisdiction.

We are not persuaded that Judge Conlin's actions in this case rise to the level of "rule-making." As a matter of course, a judge in a domestic relations case must enter orders regarding visitation, custody, and support issues. The fact that a judge's orders follow a certain pattern does not automatically convert those orders into "rules." Judges, even Justices of the Supreme Court of the United States, from time to time make declarations as to what their policy will be on future cases coming before them. *See, e.g., Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of *certiorari*) (Justice declaring that he will henceforth never vote to uphold the constitutionality of a death sentence); *Sullivan v. Askew*, 434 U.S. 878, 98 S. Ct. 232 (1977) (Brennan and Marshall, JJ., dissenting from denial of *certiorari*) (Justices declaring that they believe death penalty to be unconstitutional in all circumstances).

Here, Judge Conlin is a judge in a Michigan circuit court. The circuit court is a "trial court of general jurisdiction" and is given the exclusive power to conduct trials. Mich. Const. Art. IV, § 1. The Michigan Court Rules grant Judge Conlin the power to enter orders, such as the ones complained of here, to effectuate his judgments. *See, e.g.*, Mich. Ct. R. 3.206(A); Mich. Ct. R. 2.503(D). In light of these facts, "neither the procedural errors [the defendant] may have committed nor the lack of a specific statute authorizing" his actions renders him liable for damages for his actions. *Stump*, 435 U.S. at 359, 98 S. Ct. at 1106.

The plaintiffs have failed to allege any facts that indicate Judge Conlin's acts were either non-judicial or done in the complete absence of jurisdiction. The plaintiffs' cursory allegations are simply insufficient to state a claim against a defendant who is presumptively protected by judicial immunity. Consequently, the district court was correct in

granting Judge Conlin's Rule 12(b)(6) motion on the plaintiffs' claims for damages.

IV

The plaintiffs contend that the district court erred in dismissing their claims on the grounds that the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971) required the district court to abstain from hearing their claim for injunctive and declaratory relief. Although "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity," *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S. Ct. 1970, 1981 (1984), a federal court should abstain from hearing challenges to a state's exercise of its jurisdiction in civil cases if the state's interest is so important that exercising federal jurisdiction would disrupt the comity between federal and state courts. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11, 107 S. Ct. 1519, 1526 (1987) (applying the *Younger* doctrine to state civil proceedings).

A federal court should abstain whenever it determines "(1) that state proceedings are pending; (2) that the state proceedings involve an important state interest; and (3) that the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims." *Nilsson v. Ruppert Bronson & Chicarelli Co.*, 888 F.2d 452, 454 (6th Cir. 1989). This court reviews *de novo* a district court's decision to abstain under the *Younger* doctrine. *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718, 721 (6th Cir.), *cert. denied*, 113 S. Ct. 2416 (1993).

Assuming that the plaintiffs have alleged facts that make injunctive and declaratory relief appropriate,[2] the district court was nonetheless correct in abstaining on the basis of

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[2]Equitable relief against a judge, as with any other defendant, is limited to cases where there is "a showing of an inadequate remedy at law and of a serious risk of irreparable harm . . . ." *Pulliam*, 466 U.S. at 537, 104 S. Ct. at 1978 (citation omitted).

the *Younger* doctrine. First, all three plaintiffs have domestic relations cases that are all apparently still pending in Michigan Circuit Court. Second, the state proceedings involve a paramount state interest, *i.e.*, domestic relations law. *See, e.g., Parker v. Turner*, 626 F.2d 1, 4 (6th Cir. 1980). Finally, the plaintiffs have failed to show that the Michigan courts cannot or will not provide an adequate opportunity to raise their constitutional claims. Consequently, the district court was correct in dismissing the plaintiffs' claim for prospective relief.

For the above-stated reasons, we AFFIRM the district court's order dismissing the plaintiffs' claims.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SHELLY L. MANN and ROBERT W. THORSON, on behalf of themselves and all others similarly situated,

Plaintiff,

-vs-

PATRICK J. CONLIN,
Defendant.

Case No. 92CV74022DT

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AMENDED COMPLAINT

Plaintiffs SHELLY L. MANN and ROBERT W. THORSON, on behalf of themselves and all others similarly situated, by their attorney, Shirley J. Burgoyne, for Complaint against PATRICK J. CONLIN, state as follows:

GENERAL ALLEGATIONS

I. Jurisdiction and Venue

1. This is a class action for

injunctive and declaratory relief and for damages, pursuant to 42 U.S.C. Section 1983 and jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331 and 1343, to secure rights, privileges, and immunities established by the Thirteenth and Fourteenth Amendments to the United States Constitution. Declaratory relief is sought under 18 USC §§ 2201 and 2202. Injunctive relief is sought under 42 USC § 3613 (c) (1). Attorney fees are authorized for actions under 42 USC § 1983 by 42 USC § 1988.

2. Venue is placed in this district because it is where the defendant resides and where the events complained of occurred. Venue is based on 28 USC §1391.

II. Parties

3. Plaintiffs Shelly L. Mann and Robert W. Thorson are citizens of the

United States and residents of the State of Michigan. Robert W. Thorson resides in Washtenaw County; Shelly L. Mann resides in Wayne County.

4. At all times relevant hereto, defendant Patrick J. Conlin was a resident of Washtenaw County, Michigan, an attorney licensed to practice law in the State of Michigan, and serving as a Circuit Judge of the 22nd Judicial Circuit, County of Washtenaw, State of Michigan. He is sued individually and in his official capacity.

5. At all times relevant hereto Defendant, PATRICK J. CONLIN, was acting under color and pretense of the statutes, ordinances, regulations, cases, customs and usages of the State of Michigan, and under the authority of his office as a circuit judge of this county and state.

III. Class Action Allegations

6. Plaintiffs are members of a class composed of all persons who are citizens of the United States, or other persons, who have been subjected to acts, and the consequences thereof, in violation of their constitutional rights, by the Defendant, Patrick J. Conlin, as hereinafter alleged.

7. This class action is brought pursuant to Rule 23, Federal Rules of Civil Procedure. This class action is properly brought because:

a. The class is so numerous that joinder of all members is impracticable;

b. There are questions of law and fact common to the class.

c. The claims of the representative plaintiffs are typical of

the claims of the class and it can reasonably be expected that defendants will interpose identical defenses to any and all of such claims.

d. Shirley J. Burgoyne, attorney for plaintiffs, will thoroughly and adequately protect the interests of the class; and

e. Defendant, in acting as hereinafter alleged, has acted and refused to act on grounds generally applicable to the class.

CLASS ACTION CLAIM

8. The defendant, as a circuit judge, conducts his courtroom and court business, in particular in the area of family law, in violation of his duties, causing repeated, and frequent, deprivation of constitutional rights to litigants whose cases are assigned to him.

9. Plaintiffs in the class which the individual plaintiffs represent have been subjected, by repeated and numerous acts of the defendant, to deprivation, under color of law, of rights, privileges, and immunities secured to them by the Constitution and laws of the United States and the State of Michigan, their rights to security of person and freedom from arrest, their rights not to be deprived of liberty without due process of law, guaranteed by the Fifth and Fourteenth Amendments to the Constitution; and their rights to the equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution.

10. Defendant, PATRICK J. CONLIN, as a circuit judge, owed to the plaintiffs in the class the duty of using

due care in carrying out his functions as a circuit judge, the duty of not violating the constitutional rights of litigants appearing in his court room, the duty of not acting beyond his jurisdictional powers in his judicial capacities, and the duties of properly discharging his administrative and enforcement responsibilities according to the Constitution of the United States and the law and Constitution of the State of Michigan. In particular, his duties included the following:

a. The duty, in his judicial, adjudicative, capacity to deliberate, weigh evidence, and decide fairly, without precipitous action, or making decisions and taking sides early on (before evidence is presented), and the duty to respect the constitutional rights of privacy, family

rights, not to impute income to litigants with minor children who are public assistance, and to treat litigants with respect and without harassment;

b. The duty, in his judicial, adjudicative, capacity to not hold hearings when he has no jurisdiction;

c. The duty, in his administrative capacity to set dates for hearings on matters within his jurisdiction;

d. The duty, in his administrative capacity, to set hearing dates on contested child custody matters, as prescribed by court rules, and to set them within 56 days [see MCR 3.206(F)];

e. The duty, in his administrative and enforcement capacities, to follow the law and court rules regarding collection laws or contempt

proceedings;

f. The duty, in his administrative and enforcement capacities, not to attempt the collection of attorney fee debts by duress, by denying a litigant's constitutional right to a hearing;

g. The duty, in all his functional capacities, not to violate the constitutional rights of litigants in his court room or affected by his court business, and not to interfere with the litigants right to the assistance of counsel.

11. Defendant, PATRICK J. CONLIN, as an attorney and as a circuit judge, violated his duties to the plaintiffs in the class, and in the violation of such duties, infringed upon the plaintiffs' constitutional rights as

alleged hereinabove in paragraphs 8, 9 and 10, as follows:

a. Defendant has frequently, and repeatedly, violated the duty of using due care in carrying out his functions as a circuit judge when acting in family matters, invades the privacy of litigants, violates the rights of the family unit, fails to uphold the responsibility of the best interest of the children, and harasses litigants violating their privacy and integrity. Examples of this conduct include bizarre, cruel, and unusual methods of adjudication or to obtain compliance from litigants; making precipitous decisions; insulting and harassing parties and witnesses; taking sides with one party (often disregarding the rights of litigants and the best interest of the minor children involved)

and resulting in the other party being denied a fair hearing. He enters orders based only on friend of the court recommendations (and often only upon his own whims), and implements changes, usually in child custody and child support, and often post-judgment, without first holding an evidentiary hearing. He often holds himself to be above the law, makes his own laws, and does not follow directives from the Court of Appeals. These acts violate the litigants constitutional rights to due process and equal protection. Sometimes these acts, though improper, are within his jurisdiction and other times these acts are outside his jurisdiction.

b. Defendant has violated his duty, in his judicial, adjudicative, capacity to act within his jurisdiction,

by hearing cases that by court rule are within the exclusive jurisdiction of the Court of Appeals;

c. Defendant has violated his duty, in his administrative capacity, to set dates for hearings on matters within his jurisdiction;

d. Defendant has violated the duty, in his administrative capacity, to set hearing dates on contested child custody matters, as prescribed by court rules, and to set them within 56 days [see MCR 3.206(F)];

e. Defendant has violated his duty, in his administrative and enforcement capacities, to follow the law and court rules with regard to collection laws or contempt proceedings;

f. Defendant has violated his duty, in his administrative and

enforcement capacities, to not attempt the collection of attorney fees debts through the denial of a litigant's constitutional right to a hearing, by signing an order that requires the payment of money as a condition for the granting of a litigant's constitutional right to a hearing;

g. Defendant has violated his duty, in all his functional capacities, to not violate the constitutional rights of litigants in his court room or affected by his court business, including but not limited to his failure to follow court rules, making up his own rules, with regard to when attorney fees in domestic relations cases will be paid by the other party contrary to the standards of MCR 3.206(A) and other applicable court rules.

12. The acts of the Defendant as described above were all performed with

malice and premeditation, with knowing disregard for duty and the persons affected, under color of state law with willful and wanton disregard of Plaintiffs' rights under the United States and Michigan Constitutions and in contravention of the letter and spirit of 42 USC 1983.

13. Defendant's negligent and willful conduct and his wrongful policies and judicial procedures have caused damages for the class of plaintiffs represented by SHELLY L. MANN and ROBERT W. THORSON, including specific injuries to be alleged when the class members are identified, and including attorney fees and costs in the prosecution of this action.

14. As a proximate cause of the negligent, intentional and willful conduct

of defendant, and his wrongful policies as a circuit judge, the plaintiffs in the class represented by SHELLY L. MANN and ROBERT W. THORSON, have been deprived of constitutional rights and liberty and have suffered, and will continue to suffer, great mental anguish, trauma, and emotional upset.

15. As a result of the gross, willful and flagrant violation of Plaintiffs' constitutional rights as set out above, Plaintiffs in the class are entitled to a substantial award of both compensatory and punitive damages as full compensation for those damages caused by the acts of the defendant that are not by law protected by judicial immunity.

16. The acts of defendant as alleged herein are serious, numerous, and frequently repeated in the same, and

different cases. The plaintiffs have a right to declaratory and injunctive relief as found to be appropriate by this Court. Plaintiffs request that defendant be enjoined from continuing his illegal and unconstitutional practices and that he be enjoined from hearing family law cases.

17. In addition, plaintiffs are incurring attorney fees in the prosecution of this case and request full attorney fees as allowed by law in civil actions under Title 42 USC § 1983, as provided in Title 42 USC §1988.

CLAIM OF PLAINTIFF THORSON

18. All allegations of paragraphs 1-17 above are reallege herein by reference.

19. Plaintiff ROBERT W. THORSON is the defendant in the case of Mary Jo Thorson v Robert W. Thorson, Washtenaw

County Circuit Court Case #87-38000-DM. A Judgment of Divorce was entered on September 7, 1988. The violations of Plaintiff Thorson's constitutional rights by the Defendant Conlin began on or about May 27, 1988, and are continuing to the present time. On May 27, 1988, a settlement of the divorce case was placed on the record. On September 7, 1988, the wording of the proposed judgment was before the court; at that time the defendant ordered that Plaintiff Thorson had to pay $500 to his wife's attorney by 12:00 noon that day if he wanted a hearing on the issue of whether or not the proposed judgment conformed to the record made on May 27, 1988. Because defendant could not obtain the $500, the judgment entered did not conform to the record made on May 27.

20. On December 14, 1988, a dispute regarding visitation rights was before the defendant-judge. The defendant ordered that a friend of the court referee hearing would be held on the issue but only if the Plaintiff Thorson first paid a retainer to his wife's attorney of $500, and paid all her fees at $125 per hour before a referee hearing could be held, and the defendant ordered that Plaintiff Thorson had to agree in advance to be bound by the friend of the court recommendation. The order entered on May 17, 1989, in fact contained the provision "that the recommendation of the Friend of the Court shall be binding on the Defendant." The order contained no provision that it would be equally binding on Mary J Thorson.

21. In a hearing on May 18,

1990, the Plaintiff Thorson's attorney requested an adjournment, because her client was ill. The defendant-judge stated that he would adjourn the hearing only if Plaintiff Thorson paid $135 to his ex-wife for the amount that she claimed she was losing in wages for that day. Defendant Thorson could not pay the $135; therefore, he proceeded sick.

22. In an order dated July 13, 1992, (placed on the record on June 17, 1992), defendant ordered Plaintiff Thorson to pay $1,535 in attorney fees to Mary J Thorson's attorney as previously ordered before he would set a date for an evidentiary hearing on his motion for change of custody or refer the issue to the Friend of the Court. In the same order he stated, contrary to law and court rule, that he would not hear the custody

motion until an appeal of an order dated June 20, 1990, is fully resolved.

23. Defendant violated his duties to the plaintiff Thorson, and in the violation of such duties, infringed upon the plaintiff Thorson's constitutional rights as alleged hereinabove in paragraphs 8, 9, and 10 (a, c, d, e, f, and g) as follows:

a. Defendant breached his duty, in his judicial, adjudicative, capacity to deliberate, weigh evidence, and decide fairly. Defendant violated both the due process and equal protection clauses by ordering, on May 17, 1989, Defendant Thorson bound to the result of a referee hearing (denial of due process) and without equal treatment of Mary J Thorson (denial of equal protection) thereby made a decision or took sides early on (before evidence is presented);

b. Defendant breached his duty, in his administrative capacity, by requiring Plaintiff Thorson to pay $135 to Mary J Thorson, or proceed with a hearing while sick (on May 18, 1990);

c. Defendant breached his duty, in his administrative capacity, by refusing to hold hearings required by law and the due process clause of the constitution, and he did this several times to Plaintiff Thorson as follows:

1) defendant refused to hold a hearing on whether or not the proposed judgment conformed to the record because Plaintiff Thorson could not pay the $500 to his wife's attorney, which the judge had ordered as a condition precedent to granting a hearing on the issue;

2) defendant refused to allow Plaintiff Thorson to have a hearing

before the Friend of the Court Referee unless he first paid a retainer of $500 to Mary J Thorson's attorney and all her fees to date at $125 per hour;

3) defendant refused in the order entered July 13, 1992, to allow Plaintiff Thorson to have a hearing on his recently filed Motion to Change Custody until he paid $1,535 in attorney fees to Mary J Thorson's attorney as previously ordered on June 20, 1990.

d. Defendant breached his duties to follow the court rules when, on May 17, 1989, he ordered Plaintiff Thorson to pay a retainer and full attorney fees for his wife without first determining in an evidentiary hearing that he had the ability to pay and whether the other party needed the fees paid. [In compliance with the standards of MCR 3.206(A) and other

applicable court rules.] Defendant repeated this breach of duty again in the order of June 20, 1990, when he ordered Plaintiff Thorson to pay the $1,535 to Mary J Thorson's attorney.

e. Defendant breached his duty, in his administrative capacity, by refusing to set a hearing date on Plaintiff Thorson's motion for child custody as governed by the Michigan court rules, and by not setting it for hearing within 56 days as required by MCR 3.206(F);

f. Defendant breached his duty, in his administrative and enforcement capacities, when, on July 13, 1992, he ordered payment of $1,535, a previously ordered attorney fee, as a condition precedent to Plaintiff Thorson's having a hearing on his child custody motion

because there is no law that allows the collection of a debt or enforcement by contempt proceedings by the use of a method, duress, that states if you don't pay you don't have your constitutional right to court, a judge, and a hearing;

g. Defendant breached his duty, in all his functional capacities, by violating the constitutional rights of Plaintiff Thorson in all the violations of duty as alleged in this paragraph.

24. As a direct and proximate cause of the intentional and negligent acts of the defendant as alleged, his wrongful acts and policies, and the breaches of duty as stated, Plaintiff Thorson has been damaged by a loss of the money that he paid to obtain his rights as ordered by defendant, a loss (increasing daily) from not having a hearing on his

custody motion causing suffering upon his children and himself, has suffered monetary and emotional damages caused by the violations of his constitutional and civil rights, emotional distress, mental anguish, trauma, humiliation, and other compensatory and exemplary damages.

25. As a result of the gross, willful and flagrant violation of Plaintiffs' constitutional rights as set out above, Plaintiff Thorson is entitled to a substantial award of both compensatory and punitive damages as full compensation for those damages caused by the acts of the defendant that are not by law protected by judicial immunity.

26. The acts of defendant as alleged herein are serious, numerous, and frequently repeated in the Thorson case and are likely to continue unless

declaratory and injunctive relief is granted by this Court. Plaintiff Thorson requests that defendant be enjoined from continuing the illegal and unconstitutional practices to which he has subjected the Plaintiff Thorson, and that the defendant be enjoined from hearing family law cases.

27. In addition Plaintiff Thorson is incurring attorney fees in the prosecution of this case and requests full attorney fees as allowed by law in civil actions under Title 42 USC § 1983, as provided in Title 42 USC §1988.

CLAIM OF PLAINTIFF MANN

28. All allegations of paragraphs 1-17 above are reallege herein by reference.

29. Plaintiff SHELLY L. MANN is the defendant in the case of Randall L.

Mann v Shelly L. Mann, Washtenaw County Circuit Court Case #86-36538-DM. In the Judgment of Divorce entered on April 27, 1988, Plaintiff Mann was awarded custody of the parties' two minor children. On June 14, 1988, Randall Mann filed a post-judgment motion for custody. Following a friend of the court referee hearing and recommendation, after Plaintiff Mann's objection and requests for de novo hearing, on November 1, 1989, defendant changed custody of the children to Randall Mann without first holding a hearing as requested by Plaintiff Mann and required by law, the United States Constitution, and by the Michigan Constitution.

30. Although the defendant had no power, no right, no jurisdiction to enter an order based on a decision by a referee, not a judge, he ordered the

children turned over by noon of the same day. (November 29, 1989). Plaintiff Mann did not turn over the children. On November 30, 1989, she filed her appeal in the Court of Appeals and tried to get a correction of the clear legal error immediately. On December 1, 1989, defendant remanded Plaintiff Mann to jail until the children were turned over. Plaintiff Mann stayed in jail for ten days, could not handle it anymore, and turned over the children. When the case was heard in the Court of Appeals, they ruled that the action of the defendant was clear legal error. But it was too late, the damage had been done.

31. When the evidentiary hearing was finally held, it did not start until April 27, 1990, was continued to May 11, 1990, and concluded on May 18, 1990.

Six months passed between the granting of a hearing on November 1, 1989, and the start of the hearing in violation of the rule that custody hearing be held within the 56 days.

32. At the conclusion of the hearing the defendant, among other things, took joint custody away from Plaintiff Mann when Randall Mann had not even requested it, ordered supervised visitation (with no evidence to support), and ordered child support to be as recommended by the friend of the court. On all three points he was reversed and the case remanded.

33. In the hearing on remand, defendant did not follow the directives of the Court of Appeals order, held a hearing on issues not remanded, increased his actions that appeared to be punishing

Plaintiff Mann, and increased his harassment of her. At the conclusion of that hearing (on December 4, 1991), defendant ordered that Jack Allen, the father of her two younger children, not be present during visitation for five years, and that there shall be no smoking in her home while the two older children are present for visitation.

34. On December 11, 1991, the defendant was hearing argument for the settlement of the order from the December 4 opinion on the record. The attorney for Plaintiff Mann had obtained a transcript of the proceeding to support the fact that the proposed judgment did not conform to the judge's decision on the record. The defendant ruled to proceed paragraph by paragraph. The points being made were all supporting Plaintiff Mann, then the

defendant stated, in effect, that he had had enough and signed the order, not in conformance with the record, and without hearing the balance of the Plaintiff Mann's objections.

35. On January 8, 1992, Randall Mann filed a motion that he be permitted to move to Arkansas with the minor children and noticed it for hearing on January 29, 1992. At that time it was pointed out to the defendant that he did not have jurisdiction (to change the visitation provisions of the appealed order and grant the application to move) because the jurisdiction is in the Court of Appeals (See MCR 7.208(A) and 7.209(A). Nevertheless, he ignored the court rule and ordered the hearing to be held within one week. This evidentiary hearing date (within one week) was in marked contrast

to the several months that Shelly Mann had to wait for her custody hearing in 1990. On March 6, 1992, he commenced hearing evidence, and gave every indication that he had decided in advance to grant the move; however, after repeated objections by Plaintiff Mann's counsel that he did not have jurisdiction, he finally stopped the hearing, phoned the Court of Appeals, and advised Randall Mann and his attorney to move for a remand. Subsequently, after remand from the Court of Appeals, he granted the permission to move.

36. Defendant violated his duties to plaintiff Mann, and in the violation of such duties, infringed upon plaintiff Mann's constitutional rights as alleged hereinabove in paragraphs 8, 9, and 10 (a, b, d, and g) as follows:

a. Defendant has frequently,

and repeatedly, breached his duty to Plaintiff Mann by violating her constitutional rights, specifically by ordering that her children could not be in the presence of Jack Allen, the father of her other two children; ordering her not to smoke in her own home when the children are present; harassing her with unwarranted statements, insults, and disrespect; and invading her privacy, integrity, and family rights. He made decisions and took sides early on (before evidence is presented) to such an extent that Plaintiff Mann developed the opinion that she had always lost in advance of any hearing;

b. Defendant breached his duty, as alleged herein in paragraph 35, by setting a hearing date and commencing a hearing when he had no jurisdiction to do

so.

c. Defendant breached his duty, in his administrative capacity, as alleged herein in paragraph 31, by refusing to set a hearing date on Randall Mann's motion for change of custody, which Plaintiff Mann had asked for, within 56 days as required by MCR 3.206(F);

d. Defendant breached his duty, as alleged herein in paragraph 29, by making a decision and changing custody, which he had no jurisdiction to do. This violation is the result of a policy and practice and occurs frequently even though the defendant has been reversed on the issue at least twice by the Michigan Court of Appeals.

e. Defendant breached his duty as alleged herein in paragraphs 30, 32, 33, 34, and 35.

f. Defendant breached his duty, in all his functional capacities, by violating the constitutional rights of Plaintiff Mann, through denial of due process, equal protection, invasion of rights of privacy, and interference with and denial of the right to be represented by counsel, in all the violations of duty as alleged in this paragraph.

37. As a direct and proximate cause of the intentional and negligent acts of the defendant as alleged, his wrongful acts and policies, and the breaches of duty as stated, Plaintiff Mann has been damaged by loss of money, wrongful incarceration for 10 days at a time when she was nursing a baby, the loss from not having custody and the breakdown of the relationship with the minor children, the suffering put upon the

children, invasion of her privacy and interference with her current family relationship, caused by the defendant's illegal and unconstitutional actions, and other monetary and emotional damages caused by the violations of her constitutional and civil rights, emotional distress, mental anguish, trauma, humiliation, and harassment.

38. As a result of the gross, willful and flagrant violation of Plaintiff's constitutional rights as set out above, Plaintiff Mann is entitled to a substantial award of both compensatory and punitive damages as full compensation for those damages caused by the acts of the defendant that are not by law protected by judicial immunity.

39. The acts of defendant as alleged herein are serious, numerous, and

frequently repeated in the Mann case and are likely to continue unless declaratory and injunctive relief is granted by this Court. Plaintiff Mann requests that defendant be enjoined from continuing the illegal and unconstitutional practices to which he has subjected the Plaintiff Mann, and that the defendant be enjoined from hearing family law cases.

40. In addition Plaintiff Mann is incurring attorney fees in the prosecution of this case and requests full attorney fees as allowed by law in civil actions under Title 42 USC § 1983, as provided in Title 42 USC §1988.

WHEREFORE, Plaintiffs respectfully request that this Court grant them the following relief against Defendant:

(1) Order equitable, declaratory, and injunctive relief against Defendant,

including, but not limited to, ordering that Defendant, (i) refrain from hearing any domestic family matters; (ii) amend his policies and practices in the specific manners herein complained of to stop his infringement of constitutional rights in his court room and in the administration of the business of his court; (iii) institute internal record keeping procedures, and surveillance, to ensure compliance with these orders;

(2) Issue an order directing that Plaintiff Thorson's Motion for Change of Custody be referred to the Friend of the Court for a recommendation and the motion set for an evidentiary hearing timely and in accord with the court rules, and before a judge other than the defendant;

(3) Issue an order directing that any further proceedings in Plaintiff

Mann's case be held before a judge other than the defendant;

(4) Award damages to compensate Plaintiffs Thorson and Mann, and all plaintiffs in the class, for their actual, compensatory, damages incurred as a result of defendants' violations of their constitutional rights to the extent that such violations are not protected by judicial immunity;

(5) Award damages to fully compensate Plaintiffs Thorson and Mann, and all plaintiffs in the class, as exemplary damages for their emotional distress, mental anguish, loss of their constitutional and civil rights, humiliation and embarrassment caused by Defendants' intentional violation of their constitutional rights to the extent that such intentional violations are not

protected by judicial immunity;

(6) Grant Plaintiffs Thorson and Mann, and all plaintiffs in the class, an award of attorney's fees, costs and interest incurred in bringing this action; and

(7) Award plaintiffs Thorson and Mann and all others similarly situated such other, further, and alternative relief that the Court finds just, proper, appropriate, and equitable.

DATED: July 20, 1992

Shirley J. Burgoyne (P11409)
Attorney for Plaintiff
206 Miller,
Ann Arbor, MI 48104
(313) 665-4068

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SHELLY L. MANN and ROBERT W. THORSON, on behalf of themselves and all others similarly situated,

Plaintiff,

-vs-

PATRICK J. CONLIN,

Case No. 92CV74022DT

Defendant.

Shirley J. Burgoyne (P11409)
Attorney for Plaintiffs
206 Miller, Ann Arbor, MI 48104
(313) 665-4068

COMPLAINT OF INTERVENING PLAINTIFF

BEVERLY KISH

Intervening Plaintiff, Beverly Kish, by her attorney, Shirley J. Burgoyne, for Complaint against PATRICK J. CONLIN, states as follows:

GENERAL ALLEGATIONS

1. Intervening plaintiff

realleges all allegations of the Amended Complaint on file herein, paragraphs 1-17.

2. Intervening plaintiff BEVERLY KISH the defendant in the case of Theodore G. Apostoleris v Beverly A. Apostoleris, Washtenaw County Circuit Court Case #85-34532-DM. A Judgment of Divorce was entered on January 27, 1988. The violations of Intervening Plaintiff Kish's constitutional rights by the Defendant Conlin began on or about August 28, 1985, and are continuing to the present time.

3. On February 11, 1988, a Claim of Appeal was filed from the Judgment of Divorce entered on January 27, 1998. The filing of that Claim of Appeal vested jurisdiction in the Court of Appeals pursuant to MCR 7.204(B). Following the vesting of jurisdiction in

the Court of Appeals, the lower court does not have jurisdiction to set aside or amend the judgment or order appealed, except on order of the Court of Appeals or on stipulation of the parties pursuant to MCR 7.208(A).

4. Between February 11, 1988, and May 9, 1990, the defendant proceeded as if there was no appeal. On May 9, 1990, according to the docket entries, the Defendant ruled that he could not hear a show cause "until decision has been made by the appeals court." The proceedings between February 11, 1988, and May 9, 1990, are void for lack of jurisdiction.

5. On May 5, 1989, the Defendant entered an order suspending Beverly Kish's visitation with the minor children until a psychological evaluation is made, and the professional renders an

opinion. As of this time, Beverly Kish continues to not have visitation with her children, and the evaluation has never taken place.

6. In an order dated March 18, 1988, the Defendant ordered Beverly Kish and her ex-husband to share the cost of providing adult third party supervision on an equal basis. A dispute arose regarding the charges made by the supervising agency, Quality Care. In addition to the time for supervision, it billed the parties for preparation time for testimony and for in court time. The Defendant ignored Beverly Kish's attorney's argument that such billing was contrary to the law regarding statutory witness fees. Contrary to law, and to his own order, the Defendant in an order dated October 24, 1990, ordered Beverly Kish to pay the

disputed amount ($409.00) to Quality Care.

7. On April 17, 1992, Defendant stated in open court that he would grant an evidentiary hearing but that it would not matter because, "I always accept the recommendation of the Friend of the Court;" thereby, denying Beverly Kish's right to a de novo hearing.

8. While the case was on appeal in the Court of Appeals, the defendant ordered child support to be paid by Beverly Kish to the ex-husband and ignored laws with regard to imputation of income. Show causes continue to this date, supported by the court, to enforce payment of child support by a mother at home caring for her two children from a second marriage who are both under 3 years of age.

9. In addition, Defendant has

violated law and court rules regarding the payment of attorney fees by Beverly Kish who has no job and no funds of her own, applied rules inconsistently in the conduct of the trial of the case to favor Beverly' ex-husband as against Beverly, showing extreme disregard for the severe effect that his conduct has upon litigants and others appearing before him as a judge. This behavior by the defendant in the Apostoleris case is consistent with his repeated violations of due care as alleged in Paragraph 11 (a) of the Amended Complaint, causing considerable damage to the mother-child relationship, and to the children themselves.

10. Defendant violated his duties to the intervening plaintiff Kish, and in the violation of such duties, infringed upon the plaintiff Kish's

constitutional rights as alleged hereinabove in paragraphs 8, 9, and 10 (a, b, e, f, and g) as follows:

a. Defendant breached his duty, in his judicial, adjudicative, capacity to deliberate, weigh evidence, and decide fairly. Defendant violated both the due process and equal protection clauses by the facts as hereinafter alleged, by repeated improper acts during the trial and hearings and by not giving Beverly Kish equal treatment in his decisions and by taking sides early on, and then deciding everything in accord with that preliminary opinion, and not based on the actual evidence;

b. Defendant breached his duty, in his administrative capacity, and violated court rules and statutes, by requiring Intervening Plaintiff Kish to

pay $409 to Quality care;

c. Defendant breached his duty, in his administrative capacity, by holding hearings (having decided in advance to follow the friend of the court recommendation contrary to law); thereby, in effect, denying any hearing to Beverly Kish; therefore, the due process clause of the constitution was violated;

d. Defendant breached his duties to follow the court rules when he ordered Intervening Plaintiff Kish to pay full attorney fees for her ex-husband without first determining in an evidentiary hearing that she had the ability to pay and whether the other party needed the fees paid. [In compliance with the standards of MCR 3.206(A) and other applicable court rules.] Defendant repeated this breach of duty several times

as to Intervening Plaintiff Kish.

e. Defendant breached his duty, in all his functional capacities, by violating the constitutional rights of Plaintiff Thorson in all the violations of duty as alleged in this paragraph.

11. As a direct and proximate cause of the intentional and negligent acts of the defendant as alleged, his wrongful acts and policies, and the breaches of duty as stated, Intervening Plaintiff Kish has been damaged by a loss of the money that she paid to attempt to obtain her rights, a loss (increasing daily) from not having visitation with her minor children causing suffering upon the children as well as the Intervening Plaintiff, invasion of her privacy and interference with her current family relationship, has suffered monetary and

emotional damages caused by the violations of his constitutional and civil rights, emotional distress, psychological damages, mental anguish, trauma, humiliation, and other compensatory and exemplary damages.

12. As a result of the gross, willful and flagrant violation of Plaintiffs' constitutional rights as set out above, Plaintiff Kish is entitled to a substantial award of both compensatory and punitive damages as full compensation for those damages caused by the acts of the defendant that are not by law protected by judicial immunity.

13. The acts of defendant as alleged herein are serious, numerous, and frequently repeated in the Kish case, will not continue in the Kish case as Defendant has now disqualified himself; however, the violations are likely to continue, as to

the numerous other litigants subjected to the Defendant's illegal and unconstitutional acts, unless declaratory and injunctive relief is granted by this Court. Intervening Plaintiff Kish requests that defendant be enjoined from continuing the illegal and unconstitutional practices to which he has subjected the Plaintiff Kish, and numerous other litigants, and that the defendant be enjoined from hearing family law cases.

14. In addition Plaintiff Kish is incurring attorney fees in the prosecution of this case and requests full attorney fees as allowed by law in civil actions under Title 42 USC § 1983, as provided in Title 42 USC §1988.

WHEREFORE, Plaintiffs respectfully request that this Court grant them the following relief against Defendant:

(1) Order equitable, declaratory, and injunctive relief against Defendant, including, but not limited to, ordering that Defendant, (i) refrain from hearing any domestic family matters; (ii) amend his policies and practices in the specific manners herein complained of to stop his infringement of constitutional rights in his court room and in the administration of the business of his court; (iii) institute internal record keeping procedures, and surveillance, to ensure compliance with these orders;

(2) Award damages to compensate Intervening Plaintiff Kish, and all plaintiffs in the class, for their actual, compensatory, damages incurred as a result of defendants' violations of their constitutional rights to the extent that such violations are not protected by

judicial immunity;

(3) Award damages to fully compensate Intervening Plaintiff Kish, and all plaintiffs in the class, as exemplary damages for their emotional distress, mental anguish, loss of their constitutional and civil rights, humiliation and embarrassment caused by Defendants' intentional violation of their constitutional rights to the extent that such intentional violations are not protected by judicial immunity;

(4) Grant Intervening Plaintiff Kish, and all plaintiffs in the class, an award of attorney's fees, costs and interest incurred in bringing this action; and

(5) Award Intervening Plaintiff Kish and all others similarly situated such other, further, and alternative relief

that the Court finds just, proper, appropriate, and equitable.

DATED: November 17, 1992

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APPENDIX D

MANN v MANN

Docket Nos. 123650, 130009. Submitted February 6, 1991, at Lansing. Decided August 5, 1991, at 9:40 A.M.

Randall L. Mann and Shelly L. Mann were granted a judgment of divorce in the Washtenaw Circuit Court in which Shelly was granted sole physical custody of their two minor children and both were awarded joint legal custody. Randall thereafter moved for, and a Friend of the Court referee recommended, a change in custody. Shelly objected and requested a hearing de novo in the circuit court. Before the hearing, the court, Patrick J. Conlin, J., entered an interim order changing physical custody to Randall solely on the basis of the referee's recommendation. Shelly thereafter was found in contempt for failing to turn the children over to Randall. Following a hearing de novo, the court entered a final order that granted Randall sole legal and physical custody, permitted Shelly only supervised visitation, and adopted the Friend of the Court recommendation regarding child support. Shelly appeals both that final order and the order finding her in contempt of court. The appeals were consolidated by the Court of Appeals.

The Court of Appeals *held:*

1. The court erred when it temporarily changed custody solely on the basis of the Friend of the Court recommendation and without conducting a hearing. A court may enter an interim order changing custody only after conducting a hearing, and a Friend of the Court report and recommendation is not admissible evidence at the hearing unless the parties so stipulate. However, reversal of the final order changing custody is not required, because a hearing de novo eventually was held.

2. The defendant's violation of the interim order was properly treated as contempt of court. An order entered by a court with proper jurisdiction must be obeyed, even if the order is incorrect.

3. The court may have violated MCR 3.206(F)(1) by not conducting the hearing de novo within the prescribed time period, but no violation of due process resulted.

4. A trial court is not required to find a change of circumstances before changing custody. The court, in the best inter-

ests of the children, may change custody either for proper cause shown or because of a change of circumstances.

5. The court's finding that the plaintiff proved by a preponderance of the evidence that it was in the best interests of the children to change physical custody was not against the great weight of the evidence, a palpable abuse of discretion, or clear legal error.

6. The court erred in awarding sole legal custody to the plaintiff, who had requested continuation of joint legal custody, without giving the defendant notice and an opportunity to be heard. That part of the court's order must be reversed.

7. The court erred in delegating to the Friend of the Court the child support determination, requring a remand for the trial court's determination of the defendant's child support obligation.

8. The court did not sufficiently consider the issue of supervised visitation. Remand is necessary to permit the court to make findings of fact with regard to the order for supervised visitation.

Affirmed in part, reversed in part, and remanded.

Joseph H. Dillon, for the plaintiff.

Shirley J. Burgoyne and *Janice C. Tice,* for the defendant.

Before: DANHOF, C.J., and HOLBROOK, JR., and SULLIVAN, JJ.

SULLIVAN, J. In this consolidated appeal, defendant challenges two orders entered by the Washtenaw Circuit Court: (1) a final order changing physical and legal custody of the parties' minor children to the plaintiff (Docket No. 130009), and (2) another order finding defendant in contempt of court for her failure to turn over the parties' children to plaintiff when required by court order (Docket No. 123650). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Under the April 27, 1988, judgment of divorce, defendant received sole physical custody of the

parties' two minor sons and the parties were awarded joint legal custody. Defendant retained sole physical custody from June 1988 until November 1989, when the circuit court entered an interim order changing the physical custody of the children from defendant to plaintiff solely on the basis of a Friend of the Court referee's recommendation, and pending a hearing de novo. The hearing de novo eventually was held in April and May 1990, following which the court entered a final order granting sole legal and physical custody to plaintiff.

Precipitating the November 1989 "interim" change in custody was plaintiff's motion to change custody. In his motion, plaintiff alleged that defendant had an unrelated male living in the home with her and the children, that she was pregnant without being married, that "illegal activities" were being conducted in defendant's home in the presence of the children, and that the children's school performance had deteriorated since they had been in defendant's custody. Before recommending a change in custody, the Friend of the Court referee considered evidence taken at an evidentiary hearing and a psychological evaluation done on the parties, their mates, and their children.

Defendant objected to the Friend of the Court report and recommendation, MCL 552.507(5); MSA 25.176(7)(5), and requested a hearing de novo in circuit court. At a subsequent hearing, on November 1, 1989, the court explained that defendant, of course, was entitled to a hearing de novo. Moreover, at that time, the court adopted the Friend of the Court recommendation and, accordingly, changed physical custody of the children. However, the court did not refer to it as a change in custody. Instead, the court referred to it as a

"temporary change in possession." The court further explained that it was the court's practice under these circumstances to adopt and implement the recommendation until the hearing de novo could be held.[1]

Finally, in April and May 1990, the court held a hearing de novo with regard to plaintiff's motion for a change of custody. Following the hearing, the court granted plaintiff sole legal and physical custody of the children, granted defendant only supervised visitation, and adopted the Friend of the Court recommendation regarding child support.

Defendant now appeals as of right, raising several issues. We first address defendant's arguments regarding the interim change of custody. Defendant first argues that the trial court committed a clear legal error and deprived her of due process of law by changing custody, even temporarily, because the trial court (1) did not first hold an evidentiary hearing, (2) did not make a finding of a compelling circumstance necessitating the change, and (3) merely adopted the Friend of the Court recommendation. Where a party objects to a Friend of the Court recommendation regarding a change in custody, a court cannot permanently change custody without first holding a hearing de novo. *Crampton v Crampton*, 178 Mich App 362, 363; 443 NW2d 419 (1989). Nor can a court permanently change custody on the basis of a Friend of the Court report unless the parties agree that the court can consider the report as evidence. *Stringer v Vincent*, 161 Mich App 429, 433; 411 NW2d 474 (1987). Therefore, the question is whether the trial court may do by a postjudgment interim order temporarily changing custody that which it cannot

[1] Defendant's attorney strongly questioned the court's practice of changing custody without first holding a hearing and making the appropriate findings.

do by a final order changing custody. We hold that it cannot.

In this case, at the hearing during which the court temporarily changed custody of the children pending a hearing de novo, the court acknowledged that it did not "know much about this case." Nevertheless, the court ruled that the Friend of the Court recommendation would stand or become the order until the court could conduct a hearing de novo. The court continued: "There will be a temporary change in possession and custody until I have an opportunity—you see, I can't tell when I'm going to get this hearing done. I only have the ability to do whatever I can. And you go out and get your hearing. Until there's a hearing the recommendations of the Friend of the Court are granted. If it means a temporary change in possession and custody, then so be it." The court thereafter entered an order entitled "Interim Order Modifying Judgment of Divorce In re Custody and Support of Minor Children and De Novo Hearing," which awarded plaintiff primary physical custody of the children.

We conclude that the trial court committed a clear legal error by temporarily changing custody solely on the basis of the Friend of the Court recommendation and without holding a hearing.

Section 7(1) of the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.*, outlines the actions a court may take in a child custody dispute. Section 7(1)(c) provides that for the best interests of the child, a trial court may

> [m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age, and, subject to section 4a, until the child reaches 19 years and 6 months of age. The court

> shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. [MCL 722.27(1)(c); MSA 25.312(7)(1)(c).]

If no custodial environment exists, the trial court may modify a custody order if the petitioning party can convince the court by a preponderance of the evidence that it should grant a custody change. *Stringer, supra,* p 435.

A trial court's characterization of its change in physical custody or possession as temporary or interim, pending a final judgment, does not change the fact that the court is changing physical custody of the child. Nor does its characterization of its order as interim change the fact that it is modifying a previous divorce judgment. Therefore, § 7(1)(c) of the Child Custody Act seems to apply. However, even if § 7(1)(c) does not apply, § 7(1)(f) gives a court authority to grant an interim order changing custody: For the best interests of the child, the court may "[t]ake any other action considered to be necessary in a particular child custody dispute." Under either subsection, though, where a party objects to a Friend of the Court recommendation, a court should not be permitted to temporarily change custody without first holding a hearing.

In adopting § 7(1)(c), the Legislature intended to "minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment,' except in the most compelling cases." *Baker v Baker,* 411 Mich 567, 576-577; 309 NW2d 532 (1981). Permitting a court to even temporarily change custody solely on the basis of a Friend of the Court referee's recommen-

dation and without holding a hearing would circumvent and frustrate one of the purposes of the Child Custody Act—to minimize the prospect of unwarranted and disruptive changes of custody.

Moreover, we conclude that in determining whether a temporary change is appropriate or necessary, a hearing must be conducted. Without considering admissible evidence—live testimony, affidavits, documents, or other admissible evidence—a court cannot properly make the determination or make the findings of fact necessary to support its action under § 7(1) of the Child Custody Act. Unless the parties stipulate, a Friend of the Court report and recommendation are not evidence. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989).

Another panel of this Court considered a similar issue in *Pluta v Pluta*, 165 Mich App 55; 418 NW2d 400 (1987). The plaintiff in *Pluta* was granted permanent physical custody of the parties' minor son in a 1983 judgment of divorce. The plaintiff had custody of their son from the time they separated in 1980 until March 1985, when she left the state. The parties agreed that the defendant was to care for the child until the plaintiff returned to Michigan so that the child would not be uprooted and have to change schools during the school year. While the defendant had custody of the child pursuant to the parties' arrangement, he successfully moved the trial court for an ex parte order granting him temporary custody. The court denied the plaintiff's subsequent motion to set aside the order. The court ultimately granted permanent custody to the defendant.

On appeal, this Court held that it was clear legal error for the trial court to enter an ex parte order temporarily changing the custody of the

child. Relying on § 7(1)(c) of the Child Custody Act, this Court reasoned that the trial court could not change custody without notice to the custodial parent or a hearing with regard to the issue whether clear and convincing evidence was presented that a change of custody was in the child's best interests. *Pluta, supra,* pp 59-60.

We recognize that situations might arise in which an immediate change of custody is necessary or compelled for the best interests of the child pending a hearing with regard to a motion for a permanent change of custody. See *Ruppel v Lesner,* 127 Mich App 567; 339 NW2d 49 (1983), rev'd on other grounds 421 Mich 559; 364 NW2d 665 (1984), and cf. *Pluta, supra.* Such a determination, however, can only be made after the court has considered facts established by admissible evidence —whether by affidavits, live testimony, documents, or otherwise.[3] In this regard, we note that circuit court custody disputes and actions "shall have precedence for hearing and assignment for trial over other civil actions." MCL 722.26; MSA 25.312(6).

Our conclusion that the trial court committed clear legal error does not, however, compel us to reverse the court's final order changing custody, because a hearing de novo was eventually held.

Defendant also argues that the court's finding that she was in contempt for failing to deliver the children to plaintiff should be "purged." Several weeks after the court entered the interim order temporarily changing custody to plaintiff, defendant refused to deliver the children to plaintiff following visitation. The court ordered that defen-

[3] The transcript of the hearing during which the trial court granted temporary custody to plaintiff reveals that even plaintiff's attorney was surprised that the court was granting temporary custody at that point.

dant be held in contempt of court and jailed until she delivered the children to plaintiff. The court rejected defendant's request for a stay because its order was only temporary.[3] Defendant was jailed and remained so for several days until she agreed to deliver the children to plaintiff.

Defendant now reasons that because the interim order temporarily changing custody was erroneously entered, she could not be held in contempt for having violated it. We disagree. An order entered by a court with proper jurisdiction must be obeyed even if the order is incorrect. Therefore, violation of an order may be treated as contempt. See *In re Hague*, 412 Mich 532, 544-545; 315 NW2d 524 (1982), and *State Bar of Michigan v Cramer*, 399 Mich 116, 125; 249 NW2d 1 (1976).

Defendant further argues that the trial court's failure to hold the hearing de novo in a timely manner violated the pertinent court rule and deprived her of due process of law. MCR 3.206(F)(1) provides that "[w]hen the custody of a minor child is contested, a hearing on the custody issue must be held within 56 days after the court so directs or after the filing of notice that a custody hearing is requested." This time period may be extended for good cause. MCR 3.206(F)(3).

In this case, the hearing de novo was not held until about six months after defendant requested such a hearing. In response, we note that the Child Custody Act favors the prompt resolution of child custody disputes. See, e.g., § 6. Toward that

[3] Defendant initially filed a claim of appeal as of right from the interim order changing custody. By order entered December 12, 1989 (Docket No. 123650), this Court dismissed the appeal for lack of jurisdiction and denied the motion for enforcement of an automatic stay because the order was only temporary or interim. CYNAR, P.J., and MICHAEL J. KELLY and DOCTOROFF, JJ. Defendant's subsequent application for leave to appeal was denied on April 3, 1990 (Docket No. 124402). SHEPHERD, P.J., and CYNAR and CAVANAGH, JJ.

end, child custody disputes take precedence for hearing over other civil actions. However, even if the trial court violated the court rule by not conducting the hearing within the prescribed time period, we decline to reverse the final order changing custody on the basis of the violation. In the absence of a court rule providing a sanction for such a violation, we decline to impose one. See, e.g., *In re Kirkwood*, 187 Mich App 542; 468 NW2d 280 (1991). Nor did the violation, if any, deprive defendant of due process. *Id.*

We now turn to defendant's argument regarding the permanent change in custody. Although our review of this custody case is de novo, *Baker, supra*, p 573, we must affirm the trial court's custody decision unless it "made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; MSA 25.312(8).

Defendant argues that the trial court committed clear legal error by failing to state before or after the hearing who had the burden of proof and that the petitioning party was required to show a change in circumstances. This argument is without merit. Case law clearly indicates that the party petitioning for a change of custody always has the burden of proof. *Wilson v Gauck*, 167 Mich App 90, 95; 421 NW2d 582 (1988); *Stringer, supra*, pp 434-435. In its written opinion, the trial court correctly stated that because no custodial environment existed, the burden of proof was on plaintiff as the petitioning party.[4] Moreover, absent a request from the parties, nothing requires a trial

[4] Within her argument, defendant states, without argument or citation to supporting authority, that "[t]here was an established custodial environment in the defendant-mother." Having reviewed the record, we conclude that the court's preliminary and final finding of no established custodial environment was neither clear legal error nor against the great weight of the evidence.

court to explicitly state, in advance, which party has the burden of proof. Finally, the trial court is not required to find a change of circumstances before changing custody. The Child Custody Act provides that for the best interests of the children, the court may change custody for "proper cause shown or because of change of circumstances." Section 7(1)(c).

Defendant also argues that the trial court's findings of fact with respect to the best interest factors were against the great weight of the evidence. A trial court must consider, evaluate, and determine each of the factors contained in § 3 of the Child Custody Act, MCL 722.23; MSA 25.312(3), in determining the best interests of the children. *Truitt v Truitt*, 172 Mich App 38,47; 431 NW2d 454 (1988).

Defendant's primary challenge to the lower court's findings concerns the court's reliance on the allegedly unsubstantiated and discredited testimony of expert witness Dr. Marcella Thall, a psychologist. Both parties agreed to submit to a custody evaluation conducted by Dr. Thall, which ultimately resulted in the doctor's recommending that plaintiff be awarded custody of the children. The court's findings with respect to the § 3 best interest factors (b), (e), and (k) were based in part on Dr. Thall's opinion that defendant had an addictive personality, gave affection on a self-need basis, and had a desire for "pleasurable experiences" even if they are detrimental.

Defendant contests the weight the court gave to the testimony, not the admissibility of the testimony. However, defendant failed to cite any authority supporting her challenges to the expert's opinion testimony. The statement of a position without citation of authority to support the position is insufficient to bring an issue before this

Court. A party may not leave it to this Court to search for authority to sustain or reject a position. *Consumers Power Co v Public Service Comm*, 181 Mich App 261, 268; 448 NW2d 806 (1989). Moreover, even disregarding the court's reliance on the expert's opinion, the court's findings regarding factors (b), (e), and (k) were not against the great weight of the evidence.

Defendant also appears to challenge the trial court's findings regarding factors (c), (f), and (j). Having carefully reviewed the record, we find that the court's finding with respect to factor (c) was not against the great weight of the evidence.

The court's findings regarding the other two factors, however, do trouble us. The court's finding that factor (f)—the moral fitness of the parties—favors plaintiff seems to have been based on defendant's having had a baby with a teen-aged man to whom she was not married. We question whether, standing alone, this was enough to constitute immorality under the Child Custody Act.

The court's finding regarding factor (j)—the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent—appears to have been based on defendant's previous failure to deliver the children to plaintiff, resulting in her being held in contempt. However, in light of all the evidence presented, including defendant's reasons for failing to deliver the children, we conclude that this finding was against the great weight of the evidence. At most, however, the evidence showed that the parties were equal with respect to factors (f) and (j).

Even if the trial court made findings against the great weight of the evidence with respect to factors (f) and (j), we decline to reverse the change of custody. In light of the factors that favored plain-

tiff, and the equality of the parties with respect to the remaining factors, we conclude that the trial court's ultimate finding that plaintiff proved by a preponderance of the evidence that it was in the best interests of the children to change physical custody was not against the great weight of the evidence, a palpable abuse of discretion, or a clear legal error.

Defendant raises some issues that have merit and require a remedy. Defendant argues that the trial court committed clear legal error by awarding sole legal custody to plaintiff when he never requested it. We agree. The parties' judgment of divorce provided that they would have joint legal custody of the children. In his motion for a change of physical custody, plaintiff did not request a change of legal custody. In fact, in his supporting brief, plaintiff specifically requested the court to continue joint legal custody. The court nevertheless granted plaintiff sole legal custody, without notice to the parties and without even stating its reasons for doing so.

The court committed a clear legal error. Although the court had the authority to change legal custody, see § 7(1) of the Child Custody Act, we do not believe that it could do so without giving defendant notice and an opportunity to be heard. See, e.g., *Lyons v Lyons*, 125 Mich App 626, 630, n 5; 336 NW2d 844 (1983). The court in effect deprived defendant of the opportunity to be heard. Had defendant had notice that the court was considering awarding sole legal custody to plaintiff, she might have presented further proofs or made different tactical decisions. See, e.g., *Wilson, supra*. That part of the trial court's decision awarding sole legal custody to plaintiff is therefore reversed.

The trial court also committed clear legal error

in delegating to the Friend of the Court the child support determination. The record in this case shows that the court did not make its own independent determination with regard to child support payments, but, instead, relied solely on the Friend of the Court recommendation. See *Hoke v Hoke*, 162 Mich App 201, 206-207; 412 NW2d 694 (1987), and *Cochran v Buffone*, 137 Mich App 761, 766-767; 359 NW2d 557 (1984). This matter is therefore remanded for the trial court to determine defendant's child support obligation.

Defendant also argues that in ordering supervised visitation, the court made findings not supported by the evidence. Our reading of both the trial court's bench and written opinions indicates that the court did not sufficiently consider this issue under §§ 7 and 7a of the Child Custody Act. We therefore direct the court on remand to make the necessary findings of fact in this regard.

Defendant's remaining issues clearly are without merit and do not require discussion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.